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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

NORTHSTAR FINANCIAL ADVISORS, INC., on Behalf of Itself and All Others Similarly Situated, Plaintiff, v. SCHWAB INVESTMENTS; and MARIANN BYERWALTER, DONALD F. DORWARD, WILLIAM A. HASLER, ROBERT G. HOLMES, GERALD B. SMITH, DONALD R. STEPHENS, MICHAEL W. WILSEY, CHARLES R. SCHWAB, RANDALL W. MERK, JOSEPH H. WENDER and JOHN F. COGAN as TRUSTEES OF SCHWAB INVESTMENTS; and CHARLES SCHWAB INVESTMENT MANAGEMENT, INC., Defendants.	Case No. C-08-4119 LHK CLASS ACTION **PLAINTIFF NORTHSTAR'S MISCELLANEOUS ADMINISTRATIVE MOTION TO SUBMIT SUPPLEMENTAL CASE AUTHORITY AND TO SUPPLEMENT ITS RESPONSE AT ORAL ARGUMENT PURSUANT TO CIVIL L.R. 7-11(a)**

Pursuant to Local Rule 7-11(a), plaintiff Northstar Financial Advisors, Inc. moves for permission (1) to provide as supplemental authority an opinion of the U.S. District Court for the District of Massachusetts in *Bergeron v. Ridgewood Securities Corp.*, 610 F. Supp. 2d 113 (D. Mass. 2009); and (2) based on *Bergeron*, to supplement its response at oral argument concerning *Hamilton v. Allen*, 396 F. Supp. 2d 545 (E.D. Pa. 2005) relied upon by defendants. In view of the Court's weighing of the breach of fiduciary authority during the hearing, Plaintiff's Counsel thought it would be helpful to the Court to consider *Bergeron*, and a brief additional statement by Plaintiff's counsel concerning *Hamilton* in light of *Bergeron*.

Plaintiff's counsel has notified opposing counsel of its intention to provide this supplemental authority and argument. Declaration of Robert Finkel In Support of Plaintiff Northstar's Miscellaneous Administrative Motion to Submit Supplemental Case Authority and to Supplement its Response at Oral Argument, ¶ 2. Opposing Counsel objected to plaintiff's counsel's request. *Id.*

Bergeron addresses the issue raised by the Court at oral argument this past Thursday, January 13, 2010, whether a trustee of a Massachusetts Business Trust owes a fiduciary duty to investors in the Trust. The *Bergeron* court stated (at 135-36) that:

> Defendants agree that a manager or trustee of a business trust, like a director and officer of a corporation, owes the trust and its investors fiduciary duties of care and loyalty, and that Ridgewood therefore owed those duties to the plaintiff in connection with his investments in the Venture Funds.

Bergerson follows a long line of Massachusetts Supreme Judicial Court and lower Massachusetts state court decisions that have consistently held that "trustees [stand] in a fiduciary relationship to all of the beneficiaries of the trust." *Fogelin v. Nordblom*, 521 N.E.2d 1007, 1011 (1988) (cited in Plaintiffs' Opposition Memorandum [ECF 158] at 8).

In contrast, the one case cited by defendants for the improbable proposition that a trustee owes no fiduciary duties to beneficiaries of the trust is a decision of the U.S. District Court for Eastern District of Pennsylvania, which sought to interpret Massachusetts and Ohio law. *Hamilton v. Allen*, 396 F. Supp. 2d 545 (E.D. Pa. 2005). *Hamilton* has never been cited with approval or otherwise by a court in Massachusetts, and even *Hamilton* acknowledges that in appropriate circumstances a trust or trustee may owe direct fiduciary duties to individual investors. *Id.* at *550* ("A plaintiff may assert a direct action against a corporation only if the plaintiff is injured in a way that is separate and distinct from an injury to the corporation."). (Quotations omitted.)

Hamilton concerned the trustees' failure to file proofs of claims in securities litigation on behalf of the trust. *Hamilton* did not address individual voting rights claims, such as the claims here, which the Ninth Circuit has determined are direct claims. *See Lapidus v. Hecht*, 232 F.3d 679, 683 (9th Cir. 2000) ("the plaintiffs' … contractual rights as shareholders to vote on proposed changes … are sufficient to satisfy the injury requirement for a direct action.") (cited in Plaintiff's Opposition Memorandum, ECF 158, at 6 and 22).

Plaintiff respectfully submits that the Court consider *Bergeron* and the foregoing supplemental argument in rendering its decision.[1]

Dated: January 20, 2011

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[1] If the Court were to apply Massachusetts law under the internal affairs doctrine, it would also be appropriate to apply the "Delaware carve-out" under SLUSA (15 U.S.C. § 77p(d)(1)(A)) referenced by plaintiff in its December 6, 2010 Opposition Mem. [ECF 158] at 21 fn. 25 (although SLUSA is in any event inapplicable to plaintiff's claims in this action).

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